

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 766 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NIRMALABEN SHEDHALAL NATHALA

Versus

MINABEN ALIAS MINAXIBEN KAUSIKKUMAR SHAH

Appearance:

MR MANOJ N POPAT for Petitioner

MRS KETTY A MEHTA for Respondent No.1,3,4,5 & 6.

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 17/10/96

ORAL JUDGEMENT

The petitioner who is the original plaintiff in Regular Civil Suit No. 1128 of 1995 of the court of the learned 4th Jt.Civil Judge (S.D.), Surat, has filed this Civil Revision Application under S.115 of the Code of Civil Procedure challenging the judgment and order dated 21.3.1996, passed by the learned Assistant Judge, Surat in Civil Misc. Appeal No. 25/96 and Civil Misc. Appeal No. 26/96, whereby the learned Assistant Judge dismissed

Civil Misc. Appeal No. 25/96 filed by the present petitioner and allowed Civil Misc. Appeal No. 26/96 filed by the present Respondents No. 1, 2 and 3.

2. The brief facts of the case leading to the present revision application are as under :

The suit property bearing City Survey No. 2280 of Ward No. 7, Surat belonged to one Kuberdas Kalyandas. The petitioner's mother Saraswatiben was the daughter of deceased Kuberdas Kalyandas. The mother of Saraswatiben had died and another wife of Kuberdas Kalyandas, viz. Ruxmani had six children who are the defendants in the suit. According to the plaintiff, she is residing in Ward No.7, Nondh No.2280 of Rampura Kadiya Sheri and she is the owner of the said property and the defendants have no right to disturb her possession. The plaintiff has therefore, filed the aforesaid Regular Civil Suit No. 1128/95 on 19.10.1995 for a declaration and injunction that she is the owner of the suit property bearing Nondh No. 2280 of Ward No.7 situated at Rampura, Surat and alongwith the suit she filed application Ex.5 for ad-interim injunction restraining the defendants from interfering with her possession over the suit property.

3. The defendants contested the ad-interim injunction application by filing their written statement setting out facts which are as under :

That deceased Kuberdas Kalyandas had executed a deed of relinquishment dated 14.10.1960, which was registered on 17.10.1960 (Mark 19/1) and released his share in favour of his five sons, and thereafter the five sons had gifted the suit property to deceased Ruxmaniben, by a registered gift deed on 15.2.1964, and therefore, Ruxmaniben became the absolute owner of the property and deceased Kuberdas Kalyandas had no right, title or interest in the property. It is contended by the defendants that after Ruxmaniben became the sole owner of the disputed property, she executed a registered Will on 29.5.1975 by dividing the property between three daughters and the step-daughter Saraswatiben was given life interest in the property on the ground floor portion consisting of two rooms of Ward No.7, Nondh No.2280. After the death of Saraswatiben, funeral and all the other ceremonies were performed by the defendants and the defendants had put their lock on the suit property. It is the case of the defendants that as the plaintiff-petitioner was trying to disturb the possession of defendant no.1 Minaben @ Minaxiben, she filed Civil Suit no. 1080 of 1995 against the present petitioner for

a declaration that she was the owner of the property Nondh No. 2280 of Ward No.7 and injunction restraining the present petitioner from interfering with the possession of Minaben of the suit property.

The said Suit No.1080/95 was filed on 30.9.1995, wherein a Court Commissioner was appointed on 4.10.1995, who had carried out local inspection of the disputed property. At the time of preparation of the panchnama by the Court Commissioner, Defendant No.1 - Minaben had opened the lock put on the property, and after the panchnama was completed, she had again locked the front door of the property and kept the keys with her. It is to be stated that when the Court Commissioner prepared the report, Mitaben, the daughter of the petitioner was present. After the panchnama was prepared on 4.10.1995, the present petitioner filed Civil Suit No.1128 of 1995 on 19.10.1995 for a declaration that she has got undivided share in the suit property being the heir of deceased Kuberdas Kalyandas and the defendants were trying to disturb her possession over the suit property. Alongwith the suit, the petitioner filed application Ex.5 for ad-interim injunction, restraining the defendants from disturbing her possession.

4. The courts below in the application for injunction filed by the present petitioner came to the conclusion that defendants no.1 to 3 were the sole and legal owners of the disputed property as defendants no.1 to 3 have acquired legal title by the Will (Mark 19/3) executed by Ruxmaniben. The courts below have also found that when the panchnama was prepared by the Court Commissioner on 4.10.1995 in Civil Suit No.1080/95, defendant no.1 was found in possession of the disputed property, but thereafter by abusing the process of the court and committing contempt of the court, in spite of their being order to maintain status quo, the petitioner has trespassed into the suit property and thereafter filed Civil Suit No. 1128 of 1995 in the Civil Court at Surat, and that with a view to show her possession over the suit property, the petitioner had filed an application for appointment of Commissioner, and accordingly the Commissioner prepared panchnama wherein possession of the petitioner-plaintiff was shown, which possession was not legal and referable to a valid title. The courts below have also found that by Will mark 19/3, the disputed property had come to the share of defendants no.1 to 3 who were the real daughters of Ruxmaniben. The lower appellate court as well as the trial court have categorically observed that the petitioner-plaintiff in her plaint has not specifically stated as to from which

date she had come into possession of the suit property. The courts below have also considered the electoral roll produced at mark 47/1, wherein the names of the petitioner and her family members were shown at Sl.No. 247 to Sl.No.250, and their address was shown as Ward No. 7/35/112/1 in Saiyadpura, Nagorivad. This electoral roll also negatives the case of the petitioner that she was residing in the suit property. The affidavit of one Abdul Hameed Ahmadbhai which is produced on record at Ex.34 also establishes that the petitioner alongwith her husband and other family members was residing after her marriage, at Saiyadpura, Nagorivad as a tenant in the property of the co-ownership of the deponent of the affidavit with one Mahamadbhai Ibrahimbhai. The lower appellate court and the trial court also observed that the affidavit of one Rajeshkumar Dhansukhlal Gandhi who is running a fair-price shop in the name of Gurukrupa Consumer Stores Ration Shop bearing No. C-17 shows that the ration card of deceased Saraswatiben was registered in his shop and in that ration card only the name of Saraswatiben was entered and that she was taking ration from that shop. In his affidavit Rajeshkumar has solemnly affirmed that Saraswatiben was staying alone in the suit property. In view of this documentary evidence, both the courts below have held that prima facie defendants no.1 to 3 established that they had become the sole owner of the suit property and on 4.10.1995 defendant no.1 was in possession of the suit property. The courts below further held that the petitioner has illegally trespassed in the suit property after 4.10.1995 and has thereafter filed Civil Suit No. 1128/95 to make a show that she is in possession of the suit property and she is the owner of the same. The trial court, however, observed that since the present petitioner is in possession of the suit property, she cannot be evicted without due process of law. As stated earlier, against this finding of the trial court, original defendants no.1 to 3 had filed Civil Misc. Appeal No. 26 of 1996 in the lower appellate court, and the said court has rightly reversed the finding of the trial court by holding that the possession of the petitioner was not lawful and she cannot get any protection as her possession was not referable to a valid title.

5. The learned Counsel for the petitioner has vehemently argued that both the courts have held that the present petitioner in possession of the suit property and therefore, she cannot be thrown out without following the due process of law. In support of this submission, the learned Counsel for the petitioner has relied on the decision of the Bombay High Court (Nagpur Bench) in the case of SMT. SARLADEVI, WIDOW OF KUNDANLAL BANDAWARE vs.

SHAILESH S/o. GOURISHANKER NAMDEO, AIR 1996 BOMBAY, 98, wherein it is held that "the rightful owner of the property cannot evict the person in possession and has to follow the due process of law if he wants to dispossess that person". In my opinion, the above principle laid down by the Bombay High Court will only apply to the persons whose possession is legal. If the plaintiff has trespassed in the property illegally by abusing the process of law, she cannot be called 'a person in legal possession of the property'. In the earlier suit, which was filed by present respondent no.1, being Regular Civil Suit No. 1080 of 1995, in spite of there being an order to maintain status quo, the petitioner had illegally trespassed in the suit property, and thereafter filed Civil Suit No. 1128/95 seeking injunction against defendant no.1 from dispossessing her. The learned Counsel for the petitioner has also invited my attention to the judgment of this court in the case of RAMSHREE MAHAVIR vs. GIRDHARILAL BHOLANATH AGARWAL, XI (1970) GLR p.971, wherein it is observed that a person cannot be dispossessed without recourse to due process of law.

The learned Counsel for the petitioner has also invited my attention to the decision in the case of LALLU YESHWANT SINGH (dead) by his legal representative vs. RAO JAGDISH SINGH AND OTHERS, AIR 1968 SC, 620, wherein it is held that "the landlord has no right to re-enter the property and for dispossessing the tenant he must approach the court in accordance with law, and forcibly taking possession is illegal".

6. The principle laid down by the Supreme Court in LALLU YESHWANT's case (supra) will not apply to the facts of the present case. Here the petitioner who has no legal right or title over the suit property has illegally trespassed into the suit property in spite of the fact that earlier the court had granted status quo order. The petitioner is neither a trespasser nor a tenant in the suit property. Therefore, there is no question of taking any legal action against her for evicting her from the suit property.

7. The learned Counsel for the Respondent-original defendant no.1 has submitted that the petitioner has no legal right or title over the suit property and in spite of the order of the trial court passed in Civil Suit No. 1080/95 directing the parties to maintain status quo in respect of the suit property, the petitioner has illegally entered in the suit property with a view to making out a case for filing subsequent Civil Suit No. 1128/95. It is also submitted that the original

defendant No.1 Minaben had lodged complaint mark 7/1 before police that the present petitioner might illegally trespass into the property and therefore, she had asked for police protection. The learned Counsel for the respondent-original defendant no.1 has invited my attention to the decision of the apex court in the case of PREMJI RATANSEY SHAH & ORS. vs. UNION OF INDIA & ORS., JT 1994(6) S.C., 585,. wherein it is held as under:

" It is equally settled law that injunction would not be issued against the true owner. Therefore, the Courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession, as against the owner. Pretext of dispute of identity of the land should not be an excuse of claim injunction against true owner."

As observed earlier, the petitioner, after preparation of the first panchnama by the Court Commissioner appointed in Civil Suit No. 1080 of 1995 on 4.10.1995 had, by illegal means, unauthorisedly entered in the suit property just to show her possession which was illegal and unauthorised. Therefore, as per the principles laid down by the apex court in PREMJI RATANSEY's case (supra), the petitioner is not entitled to any injunction in her favour. Both the courts below have held that the petitioner had no valid title over the suit property and was not residing in the suit property and this finding is supported by documentary evidence in the nature of electoral roll, affidavit of the owner of the Consumer Stores who is running a fair price shop in the locality, Will executed by Ruxmaniben in favour of defendants no.1 to 3, release deed of Kuberdas Kalyandas and Court Commissioner's report in Civil Suit No.1080/95. Even in the plaint of the suit also the plaintiff had not come out with clear averment as to when she acquired possession of the suit property. In view of all these specific findings of the trial court and the lower appellate court, which are concurrent findings, this court while exercising power under S.115 of the C.P.Code cannot interfere with the same.

In the case of MUNICIPAL CORPORATION OF DELHI vs. SURESHCHANDR4A JAIPURIA AND ANR., AIR 1976 SC 2621, the Supreme Court has held that "interference by High Court with the concurrent findings was unjustified as the court had overlooked the principles governing interference under S.115 of the C.P.Code".

8. Ms.K.A.Mehta, the learned Counsel for respondent -original defendant no.1 has stated that Minaben who is the plaintiff of Civil Suit No. 1080/95 had already filed an application Ex.66 for restoration of possession of the suit property in which the defendant in that suit, i.e. the present petitioner has illegally entered by clearly flouting the order of status quo granted by the trial court by order below Ex.5 in RCS No.1080/95. The learned Counsel has produced a certified copy of the application Ex.66 filed by original plaintiffs in the trial court in RCS No.1080/95, and has submitted that the trial court has passed an order on 23.9.1996 that application Ex.5 alongwith application Ex.66 is ordered to be kept pending till the decision of High Court in CRA No. 766 of 1996 (present CRA).

9. Thus original plaintiffs of Regular Civil Suit No. 1080 of 1995 have already sought help of the court in getting restored possession of the suit property to them by filing application Ex.66. By filing application Ex.66, the original plaintiffs have already resorted to due process of law for getting possession restored which is illegally taken away by the present petitioner. The trial court therefore, requires to be directed to hear applications Ex.5 and Ex.66 as expeditiously as possible and dispose of the same, in accordance with law.

10. Both the courts below have by concurrent findings held that the plaintiff, i.e. present petitioner had failed to prove her prima facie case, that balance of convenience is not in her favour and irreparable loss would be caused to defendants no.1 to 3 if injunction sought for is granted. No error of jurisdiction has been pointed out by the learned counsel for the petitioner. Therefore, I do not find any merits in this Civil Revision Application, which is hereby rejected. Rule discharged with no order as to costs. The trial court is directed to hear and decide applications Ex.5 and Ex.66 filed in Regular Civil Suit No.1080 of 1995 as expeditiously as possible.

abraham.

